No. 06-450

In The

Supreme Court of the United States

JOSEPH EDMUND PUERTAS,
Petitioner,

v.

PATRICIA CARUSO, Director Michigan Department Of Corrections, NICK LUDWICK, Warden, Egeler Reception and Guidance Center, and MICHAEL BOUCHARD, Sheriff, Oakland County, Michigan,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In this federal habeas action, did the Court of Appeals correctly conclude—and in a manner consistent with all the other federal circuit courts of appeals that have addressed this type of claim—that the State appellate court's application of *Brady v Maryland* and its progeny to the complex and detailed facts of this case was neither contrary to nor an unreasonable application of clearly established federal law as determined by this Court?

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JURISDICTION

Petitioner, a person in State custody, commenced this action in the United States District Court for the Eastern District of Michigan, pursuant to 28 USC § 2254, by filing a petition for writ of habeas corpus on June 23, 2003. The district court issued an opinion and order that denied the petition on October 19, 2004, and issued a certificate of appealability on all issues raised in the petition. (Appendix to Petition, page 69a) Petitioner filed a notice of appeal pursuant to 28 USC § 2253. On February 13, 2006, the United States Court of Appeals for the Sixth Circuit affirmed the district court's denial of the writ in an unpublished opinion authored by Judge Sutton and joined by Judge Merritt. In a dissenting opinion, Judge Moore stated that she would grant a writ of habeas corpus. (Appendix to Petition page 1a) Petitioner filed a petition for rehearing and rehearing en banc. In response to the petition, the Sixth Circuit panel issued an amended unpublished opinion again affirming the district court's denial of the writ (with Judge Moore again dissenting). The Court of Appeals gave Petitioner the opportunity to amend his petition for rehearing and rehearing en banc in response to the amended unpublished opinion. Petitioner did so and, in an order dated July 13, 2006, the Court of Appeals denied the petition for rehearing en banc as no judge of that Court requested a vote on the petition and the original panel denied the petition for rehearing (Judge Moore would have granted rehearing for the reasons stated in her dissent). (Appendix to Petition, page 118a)

Petitioner subsequently filed a petition for a writ of certiorari in this Court. On November 20, 2006, this Court requested that Respondents file a brief in opposition to the above petition. This Court has jurisdiction to determine the issues raised in the petition pursuant to 28 USC § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 USC § 2254(d)(1) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

28 USC § 2254 (e)(1) provides:

> In a proceeding initiated by an application for a writ of habeas corpus by a person in custody pursuant to judgment of the State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

COUNTER STATEMENT OF FACTS

Joseph E. Puertas, hereinafter referred to as Petitioner, and James M. Talley were charged with criminal offenses under Michigan State law as a result of their involvement in the distribution of cocaine between August and December of 1997. Petitioner was convicted following a jury trial before the Honorable Colleen O'Brien of the Oakland County Circuit Court in the State of Michigan of one count of conducting a criminal enterprise (racketeering), and six counts of delivery of less than 50 grams of cocaine (second offense). Petitioner was charged as a controlled substance second offender due to a prior conviction for drug dealing. The trial court sentenced Petitioner in December of 1999 to six terms of two to forty years incarceration and one term of two to twenty years incarceration, with all sentences to be served consecutively.

The Michigan Court of Appeals accurately and succinctly summarized the underlying trial facts of this case as follows:

> On August 7, 1997, the Oakland County Sheriff's Department raided the home of Jimmy Sweeney, seized cocaine, money and guns, and arrested Jimmy Sweeney and his brother, Joseph Sweeney. Joseph Sweeney cooperated with the arresting officers and pledged to do whatever it would take to ensure that Jimmy would not face drug charges, including working with police to buy illegal narcotics as part of an undercover investigation (controlled buys). Joseph Sweeney (Sweeney) successfully completed two controlled buys in Pontiac and was advised that he had "worked off" his brother Jimmy's drug charges.[2]
>
> Thereafter, Sergeant Ken Quisenberry of the Oakland County Sheriff's Department, who was then assigned to the Narcotics Enforcement Team (NET),[3] asked Sweeney to serve as a paid informant.[4] Detective Sergeant Gary Miller of the Oakland County Sheriff's Department and Sgt. Quisenberry discussed with

Sweeney drug trafficking in Oakland County. Sergeant Miller mentioned [Petitioner] and advised Sweeney that Puertas was dealing narcotics out of his business, the Megabowl bowling alley. Sweeney offered to try to buy cocaine from Puertas at the Megabowl.

The prosecution maintain[ed] that between August 10 and August 30, 1997, Sweeney successfully completed four controlled buys of cocaine from [Petitioner], [James] Talley [Petitioner's co-defendant] or both. The amount of cocaine ranged between one-quarter and three-quarter ounces per buy. Sgt. Quisenberry and Sweeney testified that Sweeney was searched to ensure that he had no drugs or money on his person before each buy was attempted. Sweeney was followed from the time he was given the money to purchase the drugs until he turned over any evidence of a drug purchase. For each transaction after the initial controlled buy, Sgt. Quisenberry had one or more officers inside the Megabowl whose duty it was to observe Sweeney upon his entry into the Megabowl. For two of these four controlled buys, the sole surveillance officer assigned to observe the transactions within the Megabowl was Oakland County Deputy Sheriff Kenneth Everingham. On one other occasion, Deputy Everingham was assigned surveillance with another member of the Oakland County Sheriff's Department, Sergeant Chris Yuchasz.

Between August 31 and September 24, 1997, Sgt. Quisenberry, through Sweeney, attempted five or six additional controlled buys without success. On September 25, 1997, Sweeney successfully completed a fifth controlled buy. This time, Sgt. Quisenberry personally drove Sweeney to the Megabowl, followed Sweeney into the Megabowl and joined Sgt. Yuchasz to conduct surveillance from within the Megabowl.[5]

Sweeney successfully completed a sixth controlled buy on November 19, 1997. Again, Sgt. Quisenberry followed Sweeney into the Megabowl and joined two other officers to conduct surveillance of the interaction between Sweeney and [Petitioner]. This transaction yielded two "coin envelopes containing cocaine."

After the November 18 transaction, Sgt. Quisenberry sought and obtained search warrants to search the Megabowl and other locations where defendants were observed during the investigation. Search warrants were issued for twelve different locations and, on December 16, 1997, the warrants were executed. The search involved approximately 110 investigators and two dogs purportedly trained to alert to the scent of certain illegal narcotics. The two dogs alerted to nine different safes, although no drugs were found in any of these safes. The officers in charge of the dogs testified that their dogs would alert to the trace odor that lingers even after drugs have been removed from a place. Subsequent to the search, the Oakland County Prosecutor filed a forfeiture action against the Megabowl and almost two million dollars in cash and property seized during this raid.[6]

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[2] Neither Jimmy Sweeney nor Joseph Sweeney was ever charged with any crime arising out of the August 7, 1997 raid of Jimmy's house.

[3] The NET was described at trial as a Michigan State Police coordinated program that brought together officers from eight different law enforcement agencies in Oakland County.

[4] Sweeney was paid from $40 to $150 for participating in each successful controlled buy involving defendants.

[5] Sgt. Quisenberry followed Sweeney out of the Megabowl. Sgt. Quisenberry was surprised when Sweeney produced one-quarter ounce of cocaine

> because, from what Sgt. Quisenberry was able to observe, it did not appear that a transaction took place.
> [6] See *In re Forfeiture of $1,923,235,* 247 Mich App 547; 637 NW2d 247 (2001).

[Sixth Circuit Joint Appendix Vol. I, pages 90-91]

Contemporaneous with criminal charges being filed against Petitioner, the Oakland County Prosecutor initiated civil forfeiture proceedings against assets belonging to Petitioner, members of his family, and some of his business associates. Petitioner was represented in the civil forfeiture proceedings at all times relevant for purposes of this habeas proceeding by the same attorney who represented him in the criminal matter.

Prior to the start of Petitioner's criminal trial, his attorney participated in a series of depositions in the civil forfeiture matter, including depositions of the lead investigating officer in the criminal matter, the informant, and Deputy Kenneth Everingham, who had left the Oakland County Sheriff's Office after the investigation in this case had concluded, and was now claiming, contrary to his preliminary examination testimony, that he had not in fact conducted surveillance during some of the controlled buys at the Megabowl. He also made allegations of unrelated misconduct in the Oakland County Sheriff's Office. In addition, depositions were conducted of a number of police officers (including some who had not been involved in the investigation involving Petitioner), a number of whom expressed negative opinions about how the investigation into the criminal matter had been conducted or opined based on their experience how the investigation should have been conducted.

Approximately four months before Petitioner's criminal trial began, local media reported that the Michigan State Police had initiated a public corruption investigation into Kenneth Everingham's allegations of misconduct in the Oakland County Sheriff's Office (only some of which involved the investigation of Petitioner). One newspaper article quoted Petitioner's

attorney discussing Everingham's allegations of misconduct by the Oakland County Sheriff's Office in the investigation into Petitioner's criminal wrongdoing.

The Michigan State Police public corruption investigation concluded approximately two weeks before Petitioner's criminal trial began. The investigator for the Michigan State Police found that all of Everingham's allegations of misconduct in the Oakland County Sheriff's Office regarding the investigation into Petitioner's criminal wrongdoing as well as unrelated matters of misconduct within the Sheriff's Office were unfounded.

Petitioner's criminal trial began in October of 1999. Although Petitioner's attorney indicated during his opening statement to the jury that Kenneth Everingham would be a witness for the defense, the defense ultimately chose not to call him to the stand. The jury found Petitioner guilty as charged.

After the jury convicted Petitioner, but before his sentencing, the Detroit Free Press—a local newspaper—obtained a partial copy of the report that had been generated by the Michigan State Police during its public corruption investigation.

The Detroit Free Press provided the Oakland County Prosecutor (and, apparently, Petitioner's attorney as well) with two pages of the public corruption investigation report on November 9, 1999, some eight days after the verdict in this case. Before the trial court ruled on Petitioner's first motion for new trial, an additional 13 pages of the report had surfaced with some of the materials on the pages having been redacted.

Petitioner sought a new trial before the trial court prior to his sentencing. The trial court denied this motion for new trial. It then proceeded to sentence Petitioner.

After sentencing, Petitioner's appellate attorney filed a motion for discovery in the trial court seeking an order to

compel the Oakland County Prosecutor to turn over the entire Michigan State Police public corruption investigation report to the defense. The Oakland County Prosecutor responded that he had no more of the report than had been provided to the defense, but added that he would not object to an order compelling the Michigan State Police to turn over a full un-redacted copy of the report to the trial court so that it could conduct an in-camera review to decide whether the entire report should be released to the parties. The trial court signed a stipulated order on February 16, 2000.

After conducting the in-camera review, the trial court granted Petitioner's motion for discovery in an opinion and order entered on March 27, 2000. It found that Petitioner was entitled to a full copy of the report based on an "Order Granting Motion for Additional Discovery," that had been entered on June 10, 1998, by its predecessor judge, the Honorable J.P. Jourdan, requiring the prosecution to provide to the defense, "[a]ny and all statements of interviews conducted by the prosecution and/or any investigating police agency from the beginning of the investigation until trial . . . whether in the possession of the Oakland County Prosecutor's Office or any of the police investigating agencies."

Subsequently, pursuant to the trial court's order, the Michigan State Police released a full un-redacted copy of its public corruption investigation report to Petitioner's attorney and the Oakland County Prosecutor.[1] On April 3, 2000,

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[1] The assertion by Petitioner that "[t]he prosecution, upon being ordered to do so, turned over a copy [of the Michigan State Police public corruption investigation report] to the defense" (Petition, page 7), is inaccurate and misleading in that it gives the impression that the report had always in the possession of the prosecutor or the Oakland County Sheriff's Office (the agency largely responsible for the investigation of Petitioner's criminal wrongdoing and the subject of the public corruption investigation) —an allegation that both the Michigan Court of Appeals and the federal district court found to be untrue. (Sixth Circuit Joint Appendix, Vol. I, page 94; Appendix to Petition, page 84)

Petitioner filed a second motion for new trial and request for order of dismissal.

In an opinion and order entered on May 8, 2000, the trial court granted Petitioner's motion for new trial. (Appendix to Petition, page 112a)

The Oakland County Prosecutor filed an appeal in the Michigan Court of Appeals from this opinion and order. In an unpublished opinion, dated September 27, 2002, the Michigan Court of Appeals reversed the trial judge's order granting Petitioner a new trial. (Sixth Circuit Joint Appendix, page 89) The Court also addressed additional claims of error raised by Petitioner in his appeal and found that Petitioner was not entitled to a new trial.

Petitioner then sought leave to appeal from this opinion per curiam in the Michigan Supreme Court. In an order dated May 22, 2003, the Michigan Supreme Court unanimously denied Petitioner's application for leave to appeal.[2] Petitioner filed a motion for reconsideration in the Michigan Supreme Court. The Michigan Supreme Court denied the motion in an order dated October 24, 2003.[3]

This federal habeas action and the appeal therefrom followed.

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[2] *People v Puertas*, 661 NW2d 583 (Mich, 2003).

[3] *People v Puertas*, 670 NW2d 670 (Mich, 2003).

ARGUMENT

In this federal habeas action, the Court of Appeals correctly concluded—consistent with all other federal circuits that have addressed this type of claim—that the State appellate court's application of *Brady v Maryland* and its progeny to the facts of this case was neither contrary to nor an unreasonable application of clearly established federal law as determined by this Court.

The Michigan appellate courts rejected Petitioner's claim that the Oakland County Prosecutor had violated *Brady v Maryland*[4] by "failing" to turn over a report concerning an investigation conducted by the Michigan State Police of allegations of public corruption in the Oakland County Sheriff's Office.

The Court of Appeals in its unpublished opinion and the district court determined that the State courts' decision was neither contrary to nor an unreasonable application of *Brady* and its progeny. The Court of Appeals and the district court correctly did so.

In order to demonstrate a *Brady* violation, all three prongs of the following test must be met: (1) "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching," (2) "that evidence must have been suppressed by the State, either willfully or inadvertently," and (3) "prejudice must have ensued."[5]

Petitioner claims that the Court of Appeals relieved the prosecutor's burden under *Brady* to disclose exculpatory and impeaching material to the defense and imposed a duty on the defense to search for and discover exculpatory and impeaching material. He also claims that Court of Appeals used the

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[4] *Brady v Maryland*, 373 US 83 (1963).

[5] *Strickler v Greene*, 527 US 263, 281-282 (1999).

"wrong standard" to judge the materiality of the purported *Brady* material. (Petition, page 5) Both of Petitioner's claims are without merit.

As stated in great detail by both the Court of Appeals and the district court, the defense had actual knowledge well in advance of trial of most of the pertinent information contained in the Michigan State Police public corruption investigation report (i.e. through depositions of many of the individuals interviewed during the public corruption investigation conducted during the related civil forfeiture matter).

As for the remainder of the pertinent information, both the Court of Appeals and the district court found (as did the Michigan Court of Appeals) that Petitioner had been made aware that such information potentially existed from the depositions in the civil forfeiture matter and through allegations that were made public in the local media and that he failed to make reasonable efforts to secure the information on his own, and thereby refused to characterize the information as *Brady* material.[6]

Petitioner apparently believes that a broad and non-specific discovery order (quoted in the Petition at page 9) entered by the trial court more than a year before the conclusion of the Michigan State Police public corruption investigation was as much diligence or effort as he should have been required to exercise to compel the prosecution to turn over the report generated by Michigan State Police—a report that was in fact neither in the possession of the prosecution nor in the possession of the agency investigating Petitioner's crimes.[7] He further believes that the Court of Appeals' finding that he

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[6] In support of this legal principal, the Court of Appeals cited *Coe v Bell*, 161 F3d 320 (CA 6, 1998), and *Spirko v Mitchell*, 368 F3d 603 (CA 6, 2004).

[7] See the discussion of this point in the district court's opinion (Appendix to Petition, pages 85a-86a) and the Michigan Court of Appeals' opinion (Sixth Circuit Joint Appendix, Vol. I, page 94).

should have made more of an effort to obtain a copy of the investigation report conflicts with holdings of this Court and the United States Court of Appeals for the Ninth Circuit.

The finding of the Court of Appeals on this point is a reasonable application of precedent from this Court. This Court has described the *Brady* rule as applying to information known to the prosecution, but "unknown to the defense."[8] It logically follows from this precedent that material the defense can be expected to discover or should be able to discover on its own should not be characterized as *Brady* material. Further, contrary to Petitioner's claim, this logical inference is not inconsistent with this Court's holdings in *Strickler* and *Banks v Dretke.*[9]

This Court in *Strickler* did not reach the precise question at hand stating: "We do not reach, because it is not raised in this case, the impact of a showing by the State that the defendant was aware of the existence of the documents in question and knew, or could reasonably discover, how to obtain them."[10] However, language in *Strickler* indicates that there could be circumstances where a defendant would have a basis beyond mere speculation or mere suspicion for believing that additional exculpatory or impeaching information existed so that he would be required to do more than simply rely on *Brady.*[11]

This Court in *Banks* likewise did not reach the precise question at hand. However, citing *Strickler,* this Court did not foreclose the possibility of situations arising where a defendant might be expected to exercise some diligence when serendipitously or otherwise discovering hints that additional

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[8] *Kyles v Whitley,* 514 US 419, 437 (1995). See also *United States v Bagley,* 473 US 667, 678 (1976) (Opinion of Blackmun, J); *United States v Agurs,* 427 US 97, 103 (1976).

[9] *Banks v Dretke,* 540 US 668 (2004).

[10] *Strickler,* 527 US at 288 n 33.

[11] See *Strickler,* 527 US at 286, 287.

exculpatory or impeaching information may exist. The Court merely stated that a defendant is not expected to blindly "scavenge" for such "hints of undisclosed *Brady* materials."[12]

Further, Petitioner claims that the position taken by the Court of Appeals in this regard is in conflict with the position taken by the Ninth Circuit. However, the two case authorities from the Ninth Circuit cases cited by Petitioner, *i.e.*, *Benn v Lambert,*[13] and *Paradis v Arave,*[14] are not relevant to the position taken by the Court of Appeals in this case.

In both *Benn* and *Paradis,* the prosecution provided the defense with the names of experts and evidence that they held views supporting the prosecution's theory of guilt, but did not disclose evidence that the experts had, at one point, held views which undermined the prosecution's theory of guilt. As such, although in possession of the names of the experts, the defense had no reason to believe the experts at one point had held views undermining the prosecution's theory of guilt. These facts are completely unlike those of the present case, where Petitioner not only knew the names of individuals holding negative views about the proceedings against Petitioner, but deposed many of these individuals at length during the civil forfeiture matter. Petitioner's attorney also knew that the Michigan State Police were conducting a public corruption investigation into allegations of misconduct in the Oakland County Sheriff's Office made by one of these individuals (Kenneth Everingham) whom he deposed in the civil forfeiture matter over the course of three days.

Further, contrary to Petitioner's claim, the Ninth Circuit like the Court of Appeals below has held that "defense diligence" may be required in a *Brady* situation where "the means of obtaining the . . . evidence has been provided to the defense" where the defendant "had within [his] knowledge the

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[12] *Banks,* 540 US at 695.

[13] *Benn v Lambert,* 283 F3d 1040 (CA 9, 2002).

[14] *Paradis v Arave,* 130 F3d 385 (CA 9, 1997).

information by which [he] could have ascertained the supposed *Brady* material." *United States v Dupuy;*[15] *United States v Shelton.*[16]

Moreover, it appears that every federal Circuit that has addressed *Brady* in this kind of situation[17] has, like the Court of Appeals below, required the defense to exercise some degree of diligence or effort beyond merely expecting the prosecution to comply with *Brady* or a general discovery order when it becomes evident that purported *Brady* material may exist.[18] As noted by the Seventh Circuit, "[r]efusing to characterize as *Brady* material information the defense can be expected to discover serves to weed out incredible claims of ignorance, to prevent sandbagging, and is consistent with a focus on actual knowledge."[19]

Petitioner next argues that the Court of Appeals used a test for materiality inconsistent with—and contrary to—this Court's precedent in *Kyles*[20] by concluding that the defense would not have gained "additional help" if it would have had the Michigan State Police public corruption investigation report in its possession prior to trial. Petitioner extrapolates from the language used by the Court of Appeals and its

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[15] *United States v Dupuy,* 760 F2d 1492, 1502 n 5 (CA 9, 1985), quoting from *United States v Griggs,* 713 F2d 672, 674 (CA 11, 1983).

[16] *United States v Shelton,* 588 F2d 1242, 1250 (CA 9, 1978).

[17] It appears that all the Circuit Courts of Appeals have addressed *Brady* in this situation with the possible exception of the United States Court of Appeals for the District of Columbia Circuit.

[18] See e.g. *Lugo v Munoz,* 682 F2d 7, 10 (CA 1, 1982); *United States v Paulino,* 445 F3d 211, 225 (CA 2, 2006); *United States v Perdomo,* 929 F2d 967, 973 (CA 3, 1991); *United States v Wilson,* 901 F2d 378, 380 (CA 4, 1990); *Westley v Johnson,* 83 F3d 714, 726 (CA 5, 1996); *United States v Gintjes,* 237 F3d 876, 880 (CA 7, 2001); *Johns v Bowersox,* 203 F3d 538, 545 (CA 8, 2000); *Banks v Reynolds,* 54 F3d 1508, 1517 (CA 10, 1995) (in the context of the materiality—not suppression—prong of *Brady*); *United States v Davis,* 787 F2d 1501, 1505 (CA 11, 1986)

[19] *Boss v Pierce,* 263 F3d 734, 743 (CA 7, 2001).

[20] *Kyles,* 514 US 419.

analysis of the facts that it incorrectly applied a "sufficiency of the evidence" test or "more likely than not" test instead of the materiality test mandated by *Kyles* and *Strickler*. (Petition, page 13) Again, Petitioner is wrong.

The Court of Appeals correctly cited *Strickler* (which itself repeatedly references *Kyles*) as the precedent from this Court by which to analyze Petitioner's *Brady* claim. (Appendix, page 38a) A careful review of Petitioner's discussion of his claim concerning the Court of Appeals on this point reveals that he is merely disagreeing with *how* the Court of Appeals applied this precedent.

Even the dissenting judge in the Court of Appeals does not claim that the majority applied the wrong test for the third (materiality) prong of the test for a *Brady* violation. Rather, she merely claims that the majority added elements of the second (suppression) prong of the test for a *Brady* violation and, like Petitioner, disagrees with the majority's application of the materiality prong of the test for a *Brady* violation to the facts of this case. Petitioner's disagreement with the factual analysis engaged in by the Michigan Court of Appeals, the federal district court, and now the Court of Appeals, is not a compelling reason for this Court to grant Petitioner further review.[21]

Petitioner, a previously convicted drug dealer, was convicted of additional state law drug and racketeering offenses in late 1999 and sentenced to a lengthy term of incarceration. He has spent most of the time since his conviction and sentencing on bond. It is time to end this habeas proceeding and to allow the State of Michigan to take Petitioner into custody so that he can serve the sentence imposed upon him almost seven years ago.

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[21] See 28 USC § 2254 (e)(1).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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